United Malayan Banking Corp Bhd v Chong Bun Sun and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 31–2646–87 AND F31–963–86
VISU SINNADURAI J
9 MAY 1994

Land Law *— Charge — Sale by private treaty — Whether court has power to order sale by private treaty under the National Land Code 1965 — Whether court may so order in its inherent jurisdiction or under powers given to it by the Courts of Judicature Act 1964 — National Land Code 1965 — Courts of Judicature Act 1964 s 25(2) & Schedule item 3*

Land Law *— Charge — Sale by private treaty — Whether order for sale by public auction may be varied to one for sale by private treaty on application of chargee — National Land Code 1965 s 257*

Land Law *— Charge — Order for sale — Mandatory for court to order sale unless satisfied of contrary cause — National Land Code 1965 s 256*

Land Law *— Charge — Order for sale — Powers of the court contained in the National Land Code 1965 — Consequences if court exercises powers not authorized by the National Land Code 1965 — National Land Code 1965*

Civil Procedure *— Foreclosure proceedings — Whether O 83 or O 31 of the Rules of the High Court 1980 applicable — Rules of the High Court 1980 O 83 & O 31*

Land Law *— Indefeasibility of title and interests — Insufficient instrument — Sale of charged land pursuant to grant of remedy not authorized by National Land Code 1965 — Validity of sale — Whether purchaser's title indefeasible*

Land Law *— Charge — Sale by private treaty — Sale by chargor — Consent of chargee*

Civil Procedure *— Functus officio — Sale of charged property — Whether court may entertain application by chargor to set aside order — Whether court functus officio*

Land Law *— Charge — Order for sale — Subsequent action by chargor — Whether chargor may challenge order for sale made by court in another action*

In both these applications, the chargee applied to the court for an order to enable it to sell the charged property by way of private treaty. The key issue raised was the chargee's right to sell a charged land by way of private treaty subsequent to the making of an order for sale by public auction by the court under s 257 of the National Land Code 1965 ('the NLC'). If the court did not have power to order a sale by private treaty under s 257 of the NLC, it was argued that the court had the power to do so either in exercise of its inherent jurisdiction or by virtue of the powers given to it under s 25(2) and item 3 of the Schedule to the Courts of Judicature Act 1964.

Held, dismissing the applications:

(1) It is clear from the provisions of the NLC that the law confers a special statutory right on the chargee to obtain an order for sale. This right of the chargee is independent of any other causes of action which the chargee may have against the chargor under the charge, or under any other law.

(2) In an application for an order for sale under s 256 of the NLC, the court must make an order for sale unless it is satisfied of the existence of the cause to the contrary, and such sale must be by way of a public auction and no other.

(3) Once an order for sale has been made by the court by way of a public auction under s 257 of the NLC, the court does not have the power to make a subsequent order to vary or set aside the earlier order, and to make a new order for the charged property to be sold by way of private treaty.

(4) It is clearly established that in foreclosure proceedings of a charged property, the chargee must comply with the procedural rules set out in O 83, and not O 31. Order 83 merely stipulates the procedural rules which the parties to a foreclosure action of a charged property need to comply with. The manner of the sale, and the details thereof are therefore governed by the NLC and the NLC only envisages one manner of sale which may be ordered by the court, ie sale by public auction.

(5) The NLC spells out in detail the powers of the court. These are statutory powers and the court cannot act beyond these powers. Any purported exercise of this power by granting a remedy not authorized by the NLC will be ultra vires the NLC, resulting in the sale of the charged property being rendered void, and the registration of the title in the purchaser's name not being indefeasible on the ground that the registration was obtained by means of an insufficient or void instrument.

(6) No question arises as to the court making an order for the sale of the charged property by way of private treaty by invoking its inherent jurisdiction, or by the application of any other powers conferred upon the court by any other statutes. So strict is the statutory provision on the manner of sale which the court ought to make under s 257 that s 257(1)(a) does not provide for any other method of sale. It will be a clear usurpation of the legislative function if an order for sale by private treaty is allowed.

Obiter:

(1) A chargor may, before an order for sale has been made and with the consent of the chargee, sell the charged property by way of private treaty.

(2) So long as the chargee's interest is not adversely affected, a chargor may, before an order for sale has been made and with the consent of the chargee, sell the property by way of private treaty. Even after an order for sale has been ordered, until the sale of the charged property to a third party at a public auction is concluded,

A the chargor retains the right to discharge the charge by selling the charged property. It will, however, be prudent for the chargor to obtain the consent of the chargee.

(3) Except under certain circumstances, the court which had earlier made an order for sale, is not empowered to entertain any application or action by the chargor seeking to set aside the earlier B order. The principle of functus officio, however, does not apply to consequential orders.

(4) A chargor may bring a subsequent action to challenge the order for sale, if the subsequent action is based on fraud or fresh evidence. However, whether the chargor can bring a subsequent C action based on the same facts and issue remains unclear.

(5) Where an order for sale has been made ex parte, the chargor may apply to revoke the order so made.

(6) Where no notice had been given to the chargor of any change to the terms or conditions of sale at the public auction, the chargor may apply to set aside the sale to the purchaser.

D

[Bahasa Malaysia summary

Di dalam kedua-dua permohonan ini, pemegang gadaian telah memohon kepada mahkamah untuk perintah supaya membolehkannya menjual harta yang digadai melalui perjanjian persendirian. Isu utama E yang timbul adalah tentang hak pemegang gadaian untuk menjual suatu harta yang digadai melalui perjanjian persendirian selepas mahkamah telah membuat perintah jualan melalui lelong awam di bawah s 257 Kanun Tanah Negara 1965 ('KTN'). Jika mahkamah tidak mempunyai kuasa untuk memerintahkan jualan melalui perjanjian F persendirian di bawah s 257 KTN, telah dihujahkan bahawa mahkamah mempunyai kuasa berbuat demikian sama ada dengan menggunakan bidang kuasa sedia adanya atau mengikut kuasa-kuasa yang diberikan kepadanya di bawah s 25(2) dan perkara 3 di Jadual Akta Mahkamah Kehakiman 1964.

G **Diputuskan**, menolak permohonan-permohonan itu:

(1) Adalah jelas daripada peruntukan KTN bahawa undang-undang memberikan hak statutori yang khas kepada pemegang gadaian untuk memperolehi suatu perintah jualan. Hak pemegang gadaian ini adalah bebas daripada mana-mana kausa tindakan yang lain H yang pemegang gadaian mungkin ada terhadap pemberi gadaian di bawah gadaian itu, atau di bawah apa-apa undang-undang yang lain.

(2) Di dalam suatu permohonan untuk perintah jualan di bawah s 256 KTN, mahkamah mesti membuat perintah jualan melainkan jika ianya berpuas hati bahawa terdapat sebab sebaliknya, dan I jualan sedemikian mestilah diadakan melalui cara lelong awam dan bukan cara yang lain.

(3) Sebaik sahaja perintah jualan telah dibuat oleh mahkamah melalui lelong awam di bawah s 257 KTN, mahkamah tidak mempunyai kuasa untuk membuat perintah terkemudian untuk mengubah

atau mengetepikan perintah yang lebih awal itu, dan untuk membuat satu perintah baru supaya harta yang digadai itu dijual melalui perjanjian persendirian. A

(4) Adalah mantap bahawa di dalam suatu prosiding perampasan suatu harta yang telah digadai, pemegang gadaian mesti mematuhi kaedah prosedur yang dinyatakan di bawah A 83, dan bukan A 31. Aturan 83 hanya menyatakan kaedah prosedur yang pihak kepada tindakan perampasan harta yang telah digadai mesti mematuhi. Oleh itu, cara dan butir-butir penjualan diperuntukkan oleh KTN dan KTN hanya memperuntukkan satu cara penjualan yang boleh diperintahkan oleh mahkamah, iaitu penjualan secara lelong awam. B C

(5) KTN menggariskan dengan terperinci kuasa-kuasa mahkamah. Ini adalah kuasa statutori dan mahkamah tidak boleh bertindak melampaui kuasa-kuasa ini. Sebarang penggunaan kuasa ini dengan memberikan suatu remedi yang tidak dibenarkan oleh KTN adalah ultra vires KTN, yang berkesudahan dengan jualan harta yang digadai itu dijadikan terbatal, dan pendaftaran hakmilik dalam nama pembeli tidak menjadi tidak boleh disangkal atas alasan bahawa pendaftaran itu telah diperolehi melalui suatu suratcara yang tidak sempurna atau terbatal. D

(6) Tiada soalan timbul tentang mahkamah membuat suatu perintah jualan untuk harta yang digadai itu melalui perjanjian persendirian dengan menggunakan bidang kuasa sedia adanya, atau dengan menggunakan sebarang kuasa lain yang diberikan kepada mahkamah oleh mana-mana statut yang lain. Peruntukan statutori tentang cara jualan yang patut dibuat oleh mahkamah di bawah s 257 adalah begitu tegas sehinggakan s 257(1)(a) tidak memperuntukkan apa-apa cara jualan yang lain. Jika suatu perintah jualan melalui perjanjian persendirian dibenarkan, ianya akan menjadi perampasan fungsi perundangan yang amat ketara. E F

Obiter:

(1) Pemberi gadaian boleh, sebelum suatu perintah jualan dibuat dan dengan izin pemegang gadaian, menjual harta yang digadai melalui perjanjian persendirian. G

(2) Selagi kepentingan pemegang gadaian tidak terjejas, seorang pemberi gadaian boleh, sebelum suatu perintah jualan dibuat dan dengan izin pemegang gadaian, menjual harta itu melalui perjanjian persendirian. Biarpun selepas perintah jualan telah diperintahkan, sehingga jualan harta yang digadai itu kepada pihak ketiga di suatu lelong awam disempurnakan, pemberi gadaian tetap mempunyai hak untuk melepaskan gadaian itu dengan menjual harta yang digadai itu. Walau bagaimanapun, adalah bijak untuk pemberi gadaian memperolehi izin pemegang gadaian. H

(3) Melainkan dalam keadaan-keadaan tertentu, mahkamah yang terlebih awal telah membuat perintah jualan, tidak mempunyai kuasa untuk melayani sebarang permohonan atau tindakan pemberi gadaian untuk mengetepikan perintah yang terlebih awal itu. I

A Prinsip functus officio, namun demikian, tidak terpakai kepada perintah-perintah berbangkit.

(4) Seorang pemberi gadaian boleh membawa suatu tindakan terkemudian untuk mencabar perintah jualan itu, jika tindakan terkemudian itu berasaskan fraud atau keterangan baru. Walau bagaimanapun, sama ada seseorang pemberi gadaian boleh membawa suatu tindakan terkemudian berdasarkan fakta-fakta dan isu-isu yang sama masih belum jelas.

(5) Apabila suatu perintah jualan telah dibuat ex parte, pemberi gadaian boleh memohon untuk membatalkan perintah yang telah dibuat itu.

(6) Apabila notis tidak diberikan kepada pemberi gadaian tentang sebarang pertukaran dalam terma atau syarat jualan di lelong awam, pemberi gadaian boleh memohon untuk mengetepikan jualan kepada pembeli itu.]

Notes

For cases on the order for sale of land, see 8 *Mallal's Digest* (4th Ed) paras 1111–1118.

For a case on the indefeasibility of interest in land, see 8 *Mallal's Digest* (4th Ed) para 1088.

Cases referred to

1 *Citibank NA v Jong Tze Khiok & Anor* [1993] 3 MLJ 449 (refd)

2 *Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110; [1990] 1 SCR 154 (refd)

3 *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 (refd)

4 *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294; [1994] 1 SCR 197 (refd)

5 *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119; [1994] 1 SCR 218 (refd)

6 *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd* [1988] 2 MLJ 84 (refd)

7 *Bank Bumipura Malaysia Bhd v Esah bte Abdul Ghani* [1986] 1 MLJ 16 (refd)

8 *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119 (refd)

9 *Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd* [1991] 3 MLJ 43 (refd)

10 *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1992] 2 MLJ 349; [1993] 1 SCR 54 (refd)

11 *Malaysia Credit Finance Bhd v Yap Hock Choon & Anor* [1989] 1 MLJ 232 (refd)

12 *Malayan United Bank Bhd lwn Cheah Kim Yu (Beh Sai Ming, & Satu Yang Lain, Pencelah)* [1991] 1 MLJ 313 (refd)

13 *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247 (refd)

14 *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 SCR 291 (folld)

15 *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650; [1993] 1 SCR 45 (folld)
16 *James Edward Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481; [1993] 1 SCR 74 (refd)
17 *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163; [1992] 1 SCR 64 (refd)
18 *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 (folld)
19 *Damodaran v Vasudevan* [1975] 2 MLJ 231 (refd)
20 *Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 (refd)
21 *MUI Bank Bhd v Cheah Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642; [1993] 1 SCR 188 (refd)
22 *Chartered Bank v Packiri Maideen & Anor* [1963] MLJ 276 (refd)
23 *Eng Ah Mooi & Ors v Overseas-Chinese Banking Corp Ltd* [1983] 1 MLJ 209 (refd)
24 *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504; [1991] 1 SCR 105 (refd)
25 *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (refd)
26 *Malayan United Finance Bhd v Adsonii (M) Sdn Bhd* [1990] 2 CLJ 254 (refd)
27 *Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd* [1991] 1 MLJ 98; [1991] 1 SCR 352 (refd)
28 *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 1)* [1988] 1 MLJ 546 (refd)
29 *Sindoma Realty Sdn Bhd v Overseas-Chinese Banking Corp Ltd & Ors* [1989] 1 MLJ 377 (refd)

Legislation referred to
Courts of Judicature Act 1964 s 25(2), Schedule item 3
National Land Code 1965 ss 256, 257, 266(1), 447
Rules of the High Court 1980 O 31, O 83

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Visu Sinnadurai J: At the conclusion of the hearing of both these applications, this court ruled that the orders sought for the sale of the charged properties by way of private treaties be refused, indicating that the reasons for the decision would be given subsequently in a written judgment. I now give my reasons for refusing the orders.

A short but important issue with far-reaching practical consequences, particularly to banks and other financial institutions, arose for consideration in these applications. The question that arose in these two applications relates to the chargee's right to sell a charged land by way of a private treaty, subsequent to the making of an order for sale by the court under s 257 of the National Land Code 1965 ('the NLC'). In both these applications, the

chargee applied to the court for an order to enable it to sell the charged property by way of private treaty.

The most common situation where a chargee applies to court for such an order to enable it to sell the charged property by way of a private treaty is when, pursuant to s 256 of the NLC, an order had been made by the court to sell the charged property by way of a public auction, but the chargee is unable to do so, as the property could not be sold at the public auction at a specified reserved price.

The NLC provides that on the default by a chargor, a chargee may obtain an order for the sale of the charged land: s 253(1). If the chargee intends to pursue this remedy, the chargee, under the provisions of the NLC, must comply with certain requirements as spelt out by the NLC. Only when all such requirements have been complied with, can an application for an order for sale be made to the courts: see generally the recent Supreme Court decision in *Citibank NA v Jong Tze Khiok & Anor*,[1] as to some of these procedures which need to be complied with by the chargee under the Sarawak Land Code (Cap 81), and the earlier Supreme Court decision in *Nira Sdn Bhd v Malayan Banking Bhd.*[2]

The chargee also needs to comply with the requirements of O 83 of the Rules of the High Court 1980 ('the RHC'): see the recent judgment of Shankar J in *Citibank NA v Ibrahim bin Othman.*[3] The requirement that the chargee must comply with the procedural rules (the relevant provisions of the RHC) is also spelt out in s 256(2) of the NLC which reads as follows:

> Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

Section 256(3) provides that on any such application, and if satisfied, that there is no cause to the contrary, the court shall order the sale of the land. I shall revert to this section in the later part of this judgment.

In so making the order for sale, certain matters need to be dealt with by the court. Under s 257 of the NLC every order for sale made by the court shall provide as follows:

> ...
> (a) provide for the sale to be by public auction;
> (b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;
> (c) specify the total amount due to the chargee at the date on which the order is made; and
> (d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question.

The court may also make such other directions with respect to the sale as the court thinks fit, especially where the charge in question relates to more than one piece of land: s 257(2).

I state these provisions of the NLC so as to appreciate the true nature of the chargee's right to seek an order for sale under the provisions of the NLC.

It is clear from these provisions of the NLC that the law confers a special statutory right on the chargee to obtain an order for sale. This right of the chargee is independent of any other causes of action which the chargee may have against the chargor under the charge, or under any other law. The remedy of the chargee to obtain an order for sale may therefore be described as a 'statutory right' conferred on the chargee by the NLC. Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor*,[4] described this right of the chargee as follows (at p 309):

> The order for sale confers on the chargee only the statutory right to a judicial sale. A sale under ss 256 or 260 of the NLC is a judicial sale ordered by the court on the application of the chargee.

The point that needs emphasis is that, the remedy of the chargee under the NLC is a special remedy. The action brought by the chargee, and the adjudication of it by the courts, are different to that when other causes of action are instituted by the chargee. The Supreme Court in the recent decision of *Kandiah Peter v Public Bank Bhd*[5] had the occasion to make the following comments [at p 122]:

> A chargee who makes an application for an order for sale in foreclosure proceedings under s 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue.

Other actions by the chargee

The chargee may, if he so chooses, besides resorting to this statutory right, pursue any other cause of action against the chargor for the money lent to the chargor. He may sue for a debt, or on a guarantee (if any), or on the contract. As to whether a chargee may institute an action on the guarantee and also commence foreclosure proceedings, see the Supreme Court decisions in *Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd*,[6] and *Bank Bumiputra Malaysia Bhd v Esah bte Abdul Ghani*.[7]

The difference between a foreclosure action brought by a chargee for an order for sale, and a civil suit based on a guarantee has been considered in a number of cases. For example, in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*,[8] Lamin J observed as follows (at p 121):

> The guarantee is just another security independent of the charge carrying with it its own terms and conditions to bind the guarantor and failure to comply with any of them will constitute a breach which will form the basis for the issuance of a writ.

His Lordship further observed (at p 122):

> In the cases cited above where the loan was secured by two collateral security, namely, a charge and a guarantee, our courts generally have taken the view that it is not required to realize the security under the charge before enforcing the guarantee.

Similarly in *Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd*,[9] Lim Beng Choon J observed (at p 47):

> ... apart from its common law right to sue the borrower, guarantors, and chargor for the recovery of the debt, the plaintiff [the chargee bank] is also given the statutory right to sell the charged property by order of the court pursuant to s 256(2) of the NLC. ...

To re-emphasize this point, his Lordship added (at p 47):

> In principal, therefore, a chargee has the right to institute an action for recovery of the debt and also a right to assert a power of sale on the incumbered property; the two actions are not the same.

One situation in which a chargee may pursue more than one remedy is when the charged property sold at the public auction realizes less than the amount owing to the chargee. In such a case, the chargee will then attempt to institute a separate action for the recovery of the balance of the sum owing.

Sale by public auction

Where an order for sale has been ordered by the court, certain practical problems, may arise, as is the situation in these two applications before this court, when there is no bidder at the public auction to purchase the property at the reserved price fixed by the registrar, and as a consequence, the property remains unsold. In such cases, the general practice has been for the chargee to make an application to the registrar to revise the reserved price, and if the registrar is so satisfied, a new reserved price is then stipulated and another public auction is conducted (as to the powers of the registrar to fix a new reserve price, see *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd*[10]). Following this procedure, in one of the cases before this court, six public auctions were conducted, and all of them proved to be abortive.

Strictly speaking, of course, under s 259(2)(c), the reserve price may be reduced to any amount, so as to enable the chargee to dispose of the property at subsequent public auctions. Unlike a public auction conducted by the land administrator under s 265(2), where only two public auctions may be conducted, there is no limit stated in the NLC as to the number of public auctions which may be conducted in respect of an order for sale made under s 257. However, if the reserve price is reduced to too low a sum, it may adversely affect both the chargor's and the chargee's rights.

But difficulties may still arise, when after a series of public auctions, the property remains undisposed of. It is in these circumstances that the chargee applies to the court to set aside the earlier order for sale and seeks a new order that the said property be sold by way of private treaty.

Sale by private treaty

There is no express provision in the NLC enabling the court to order a sale of the charged land by way of private treaty. Section 257 of the NLC only empowers the court to make an order for the sale of the charged property

by way of a public auction. However, I am given to understand that, it is the practice of some courts to make such orders for sale by public treaty after earlier attempts to sell the said land by private auctions have been unsuccessful. For example, in *Malaysia Credit Finance Bhd v Yap Hock Choon & Anor*[11] and in *Malayan United Bank Bhd lwn Cheah Kim Yu (Beh Sai Ming, & Satu Yang Lain, Pencelah)*,[12] (the latter case being reversed by the Supreme Court, on different grounds), Abdul Malek J, in both these cases, allowed an application for the sale of the land by way of private treaty subsequent to the making of an order for the sale of the charged property by way of public auction.

However, in the case of *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor*,[13] Wan Adnan J in the High Court expressed strong reservations as to whether the court had the power to order the sale of the charged land by way of private treaty even under s 265(3)(c) of the NLC. Wan Adnan J observed (at p 249):

> It is my view that the court has no power to order [a] sale by private treaty even under s 265(3)(c) of the National Land Code. '... to make such other order as it may think just', to my mind, does not include the power to order [a] sale by private treaty.

These observations, however, were made by Wan Adnan J in relation to an application made to the court for an order for sale of a land office title under s 265(3) of the NLC, after the sale by public auction of the land as ordered by the land administrator had been unsuccessful. The application before Wan Adnan J, it must be emphasized, was not an application made under s 256 of the NLC. Under s 256(3)(c), unlike that as provided for under s 263(2)(a), the court may either make an order for sale by way of public auction under s 256, or it may 'make such other order as it may think just'. His Lordship stated that the words 'such other order' in s 265(3) did not empower the court to make an order for sale by way of private treaty, but merely allowed the court to direct the land administrator to conduct another public auction of the land at a reduced reserved price.

I need not make any comments on the scope of s 265(3)(c), as it is not relevant for the purposes of the present applications. These applications before me concern orders for sale made by the court under s 257.

Considering the true nature of the statutory remedy of the chargee to apply for an order for sale under s 257 of the NLC, this court is of the view that once an order for sale has been made by the court by way of a public auction under s 257 of the NLC, the court does not have the power to make a subsequent order to vary or set aside the earlier order, and to make a new order for the charged property to be sold by way of private treaty.

It is the view of this court that in an application for an order for sale under s 256, the court must make an order for sale, and such sale must be by way of a public auction and no other. In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor*,[14] Lord Oliver speaking of the powers of the court in an application for sale of the charged property under s 256, observed (at p 460):

> Section 256(3) of the National Land Code is mandatory. The court 'shall' order a sale unless it is satisfied of the existence of 'cause to the contrary'. Granted that

these words have been construed in Malaysia as justifying the withholding of an order where to make one would be contrary to some rule of law or equity, they clearly cannot extend to enabling the court to refuse relief simply because it feels sorry for the borrower or because it regards the lender as arrogant, boorish on unmannerly.

In *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd*,[15] Harun Hashim SCJ in delivering the judgment of the Supreme Court also observed as follows (at p 656):

> ... under s 256(3), on an application to court for an order for sale by the chargee, it is *mandatory* on the court to order the sale unless it is satisfied of the existence of a cause to the contrary. (Emphasis provided.)

The only leeway given to the court, when considering whether an order for sale ought to be made is that provided for under s 256(3) which provides that the court may not grant an order for sale if there is 'any cause to the contrary'. The Privy Council in *Keng Soon Finance*,[14] clearly stated that the courts may only refuse to make such an order if the making of the order would be contrary to some rule of law or equity: see the Supreme Court decisions in *James Edward Buxton & Anor v Supreme Finance (M) Bhd*,[16] where the scope of s 256(3) was also considered, and *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal*,[17] where a similar provision in the Sarawak Land Code (Cap 81) was applied.

The NLC spells out in detail the powers of the court. These are statutory powers and the court cannot act beyond these powers. Any purported exercise of this power by granting a remedy not authorized by the NLC would be ultra vires the NLC, resulting in the sale of the charged property being rendered void, and the registration of the title in the purchaser's name not being indefeasible on the ground that the registration was obtained by means of an insufficient or void instrument: see the judgment of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)*,[18] approved by the Supreme Court in *M & J Frozen Food v Siland Sdn Bhd*.[4]

I therefore hold that the court is not empowered to order a sale by private treaty in an application by the chargee made under s 257 of the NLC.

Powers of the court to order sale by private treaty outside the provisions of the NLC

It was, however, argued before me that, if the court did not have the power to order a sale by private treaty under s 257 of the NLC, then this court had the power to do so either in exercise of its inherent jurisdiction, or by virtue of the powers given to it under s 25(2) and item 3 of the Schedule to the Courts of Judicature Act 1964. For this purpose, the decision of the Federal Court in *Damodaran v Vasudevan*,[19] was relied upon. In that case, the Federal Court held that though there was no machinery for the registration of a *lis pendens* under the provisions of the NLC, s 25(2) and item 6 of the Schedule to the Courts of Judicature Act 1964 empowered it to do so.

Having given careful consideration to these submissions, and in considering the nature of the statutory order for sale under the provisions

of the NLC, I am unable to concede to the arguments of counsel for the chargee. The Code itself expressly provides for the manner of sale which the court ought to make under s 257 — a sale by public auction. So strict is this requirement, that s 257(1)(a) does not provide for any other method of sale. In the face of this express provision, it would be a clear usurpation of the legislative function, if an order by way of private treaty is allowed.

There are also other dangers when the court takes it upon itself to grant other remedies which are not expressly provided for by the NLC. An example of such an approach is the decision the Federal Court in *Damodaran v Vasudevan*,[19] where the Federal Court gave recognition to *lis pendens* when it is not provided for in the NLC. This approach adopted by the Federal Court was subsequently the subject matter of much criticism by the Privy Council. Lord Diplock, in *Damodaran v Choe Kuan Him*,[20] a related case to that of *Damodaran v Vasudevan*[19] (where no appeal was brought to the Privy Council), in the course of his judgment, when called upon to invoke s 417(1) of the NLC for purposes of registration of a *lis pendens* observed (at p 270):

> The National Land Code makes no provision for the registration of a *lis pendens*. Counsel ... has drawn their Lordships' attention to s 417(1) of the National Land Code ... . But this, in their Lordships' view, does not authorize the court to direct the registrar to make on the register entries of a kind for which no express provision is made by the National Land Code and which are inconsistent with the whole scheme of the Act ... .

Lord Diplock further concluded (at p 270):

> It follows that, in their Lordships' view, the entry on the register of an order of *lis pendens* is a mere *brutum fulmen*. Even if it be lawful to make such an entry at all, it serves no useful purpose and their Lordships would suggest that the precedent set by *Damodaran v Vasudevan* [1975] 2 MLJ 231 is one which ought not to be followed.

I am therefore of the view that considering the express provision of s 257(1)(a), no question arises as to the court making an order for the sale of the charged property by way of private treaty by invoking its inherent jurisdiction, or, for that matter, by the application of any other powers conferred upon the court by any other statutes, for example, the Courts of Judicature Act 1964.

In this connection, s 447 of the NLC, a provision which is often overlooked, needs comment. Section 447 provides as follows:

> (1) Nothing in this Act shall affect the operation of any rules of court; and, if any provision of this Act is inconsistent with any provision of any rules of court, the latter provision shall prevail and the former provision shall, to the extent of the inconsistency, be void.

It may be said that the effect of this provision is that if any rule of court provides for a sale pursuant to an order for sale of a charged property to be held by way of a private treaty, that provision in the rules of the court will prevail over the provisions of the NLC, so as to entitle the chargee to apply for the order for sale by way of a private treaty.

A The relevant rules of the court, for the present purposes are the RHC, particularly O 83. It is now clearly established that in foreclosure proceedings of a charged property, the chargee must comply with the procedural rules set out in O 83, and not O 31. As pointed out earlier, s 256(2) of the NLC itself provides that an application to the court for an order for sale under s 257 must be 'in accordance with the provisions ... in force relating to civil procedure'. However, it should be noted that O 83, unlike O 31, does not state the manner in which the court may direct the sale to be conducted. Order 83 merely stipulates the procedural rules which the parties to a foreclosure action of a charged property need to comply with. The manner of the sale, and the details thereof are therefore, governed by the NLC. As seen earlier, the NLC only envisages one manner of sale which may be ordered by the court — sale by public auction. This is unlike the position where an action is commenced for the sale of property, not charged under the provisions of the NLC. In such limited circumstances, O 31 of the RHC is applicable, where under r 2(4)(b), it is expressly provided that the court in effecting the sale of the property may fix:

> the manner of sale, whether by contract conditional on the approval of the Court, *private treaty*, public auction, tender or some other manner. (Emphasis added.)

This condition, and the others stated in r 2(4) of O 31 are clearly inconsistent with s 257 of the NLC. However, as stated earlier, O 31 is not relevant for the present purposes, as it is not applicable to foreclosure actions of a property which has been charged under the relevant provisions of the NLC.

Having held that the court has no power to order the sale of the charged property by way of a private treaty in an application under s 257 of the NLC, I hasten to add that a sale of a charged property by way of private treaty may, under certain other circumstances, be permissible. There are certain circumstances under which a sale by private treaty may be conducted by the chargor, and I shall consider two such situations briefly.

(a) Right of chargor to sell the charged property by private treaty before an order for sale

A chargor may, *before* an order for sale has been made and with the consent of the chargee, sell the charged property by way of private treaty. Harun Hashim SCJ in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)*[21] observed (at p 648):

> Under the National Land Code, there is nothing to prevent a *chargor* with the consent of the chargee to sell the charged property by private treaty. There are no specific provisions in the Code for such a sale but if such a sale is concluded as a purely business arrangement, it is for the chargee to discharge the charge to give full effect to the sale. (Emphasis added.)

This right of the chargor to sell by private treaty was also emphasized by Wan Adnan J in *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor*,[13] where his Lordship observed (at p 249):

> In my view the court may allow a *chargor* of any land to sell the land in question by private treaty in circumstances where the court is satisfied that the proceeds

> of such sale are not less than the amount due to the chargee under the charge and that the chargee will be duly paid in full out of the said proceeds. (Emphasis added.)

So long as the chargee's interest is not adversely affected, there appears to be no reason as to why a chargor does not have the right to sell the charged land before an order for sale has been made. As will be seen later, even after an order for sale has been made, the chargor may sell the property by way of private treaty. In both these situations, however, it is prudent for the chargor to obtain the consent of the chargee.

In this respect, attention should be drawn to the earlier decisions of Gill J in the *Chartered Bank v Packiri Maideen & Anor*,[22] and of the Federal Court in *Eng Ah Mooi & Ors v Overseas-Chinese Banking Corp Ltd*,[23] (this decision was criticized on some other grounds by the Supreme Court in the subsequent case of *Malayan United Finance Bhd v Tan Lay Soon*[24]). In both these decisions, the court pointed out that the chargor may only sell the charged property by way of private treaty prior to the commencement of any foreclosure proceedings by the chargee. However, the decisions in these two cases may be explained on the ground that in both the cases, the courts were concerned with the sale, by the chargor of the charged property, by private treaty without the prior consent of the chargee. Those decisions, therefore, merely hold that any time prior to the commencement of the foreclosure proceedings, the chargor, may without the consent of the chargee, sell the charged property by way of private treaty. This the chargor may do in exercise of his rights as the registered proprietor of the land, though the sale must be made subject to the existing charge.

(b) Right of chargor to sell by private treaty after an order for sale

Section 266(1) of the NLC provides that the chargor, against whom an order for sale has been made may, at any time before the conclusion of the sale, tender the money owing to the chargee. The said section reads as follows:

> Any chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in sub-section (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.

This provision is in line with the principle that the chargor always retains a right to discharge a charge: see Jemuri Serjan SCJ (as he then was) in *Malayan United Finance Bhd v Tan Lay Soon*,[24] at p 508.

The most obvious manner in which the chargor may tender the money owing to the chargee is for the chargor to repay the chargee the outstanding loan, including interest thereon, which the chargor had borrowed. This the chargor may do either by obtaining the funds to repay the loan from some other independent source, or by selling the charged property to a third party. In the latter situation, the chargor may enter into a private treaty with a third party to purchase the charged property. The chargor, in such a situation may, from the proceeds of this sale, tender the said sum owing to the chargee.

There appears to be no local decision clearly dealing with the issue as to whether the chargor may sell the charged property by way of private treaty after an order for sale has been ordered. However, the recent decision of the Supreme Court in *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd*,[4] appears to lend weight to the argument that the chargor still retains such a right. Wan Yahya SCJ observed (at pp 308–309):

> Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owed the chargee (which may be less than the value of the land on sale) and call off the sale — s 266 of the NLC. The exercise of such rights does not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

The Supreme Court in *M & J Frozen Food Sdn Bhd*[4] above held that the chargor retained his rights and interests in the land even after an order for sale had been made by the court. Wan Yahya SCJ, in discussing the ambit of the chargor's rights observed (at p 308):

> The chargor does not abrogate all his rights to the chargee at the making of the order for sale. He is merely compelled to abide by the court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss 257 and 258 of the NLC.

His Lordship added (at p 308):

> ... the divesting of the chargor's right occurs only on completion of the contract of sale and conveyance ...

It therefore appears that until the sale of the charged property to a third party at a public auction is concluded, the chargor retains the right to discharge the charge by selling the charged property. If the chargor decides to do so, it is, however, prudent for the chargor to obtain the consent of the chargee. It would be most unusual for the chargee, in such circumstances to refuse consent, for after all, a sale by private treaty by the chargor, with the consent of the chargee, cannot adversely affect the chargee, so long as the chargee is repaid the sum owing. In such a situation, strictly speaking, there is no necessity for the chargor to apply to the court for any order, especially when the consent of the chargee has been obtained. The earlier order for sale made by the court ceases to have effect under s 266 of the NLC.

Other issues

Though this judgment deals primarily with the main issue as of whether the court may order a sale by private treaty after an order for sale by public auction had been made, there are a number of other related issues which have also been canvassed before me with regard to the role of the courts in such foreclosure actions. I shall now deal with these issues.

(a) Whether judge is functus officio after granting an order for sale

The NLC seems to envisage that once an order for sale has been made by the court, the duties of the court come to an end. Thereafter, all other steps

that need to be taken to complete the sale of the charged property is undertaken by the registrar of the court or by an officer of the court (ss 258 and 259). A

That the functions of a judge making an order for sale comes to an end once an order has been made, has been emphasized by the court in a number of cases. In the more recent decision of the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)*,[21] Harun Hashim SCJ observed (at p 648): B

> Indeed, following *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, the learned judge was functus officio after he made the order for sale on 29 August 1988. In the *Hock Hua* case, the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was functus officio after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. C

His Lordship then continued (at pp 648–649):

> True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a *final order* unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is functus officio and therefore has no power to set aside the order for sale. (Emphasis provided.) D

In *MUI Bank*'s case,[21] after the chargee bank had obtained an order for sale, the chargor offered the charged property for sale to a third party by way of a private treaty. At the same time, the charged property was sold at a public auction pursuant to the order for sale obtained by the bank. The third party applied to intervene in the proceedings, and the Supreme Court held that as the application to intervene was made after the certificate of sale had been issued to the purchaser at the public auction, the judge could not entertain the application for intervention as by that stage he was already functus officio. E F

In *Hock Hua Bank Bhd v Sahari bin Murid*,[25] the decision of the Federal Court relied upon by Harun Hashim SCJ in *MUI Bank*'s case,[21] after an order for sale had been drawn and perfected, the chargor, instead of appealing against the order, applied to the same court by way of notice of motion to set aside the order. The grounds upon which he sought to set aside the earlier order was precisely the same grounds as that stated in his earlier affidavit in opposition to the order for sale being made. The judge at first instance, after hearing arguments, then set aside his own earlier order for sale. As found by the then Federal Court [at pp 143–144], the judge, however, did not consider whether: G H

> ... he was functus officio. Nor that the application to set aside the order was made in the same proceedings and after the order had been drawn up. He did not appear to realize that the order was made on an inter partes application. He rejected the contention of counsel for the chargee that the only way to set aside such an order was by a fresh action if, inter alia, grounded on fraud. He thought that since the matter had not been adjudicated and the court had not pronounced a judgment upon the merits or by consent, he had the power to do what he did. I

A The Federal Court held that the judge was wrong in entertaining the second application to set aside the earlier order made by him. Chang Min Tat FJ in delivering the judgment of the Federal Court held (at p 144):

> Clearly the court has no power under any application in the same action to alter, vary or set aside a *judgment* regularly obtained after it had been entered or an order after it is drawn up, except under the slip rule ... unless it is a judgment by default or made in the absence of a party at the trial or hearing. (Emphasis added.)

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The Federal Court, however, pointed out that a party may bring a fresh action to impeach the original judgment, if the earlier judgment or order for sale had been obtained by 'fraud or when further evidence, which could not possibly have been adduced at the original hearing, is forthcoming'. In the instant case, the Federal Court held that, the judge, instead of hearing the application on the notice of motion which was based on the same grounds as that advanced earlier to set aside the earlier order, ought to have dismissed it and 'left it to the [chargor] to commence a fresh action to set aside the foreclosure order on the ground of fraud'. Chang Min Tat FJ pointed out (at p 144):

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> [The judge] had the same material before him at the first foreclosure proceeding and quite clearly he should have considered himself functus officio after having considered the contentions raised at these [the subsequent] proceedings and refused to do anything about it on the ground of lack of jurisdiction ...

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The decision of the Supreme Court in *MUI Bank Bhd*[21] and the then Federal Court in *Hock Hua Bank*,[25] clearly indicate that, except under certain circumstances, the court which had earlier made an order for sale, is not empowered to entertain any application or action by the chargor seeking to set aside the earlier order.

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A different approach was, however, taken by the Supreme Court in a recent decision. In *Kandiah Peter v Public Bank Bhd*,[5] where a similar issue as that considered in *Hock Hua Bank*[25] arose, the question of functus officio, however, was not raised or alluded to. I shall revert to this decision shortly.

G Finally, on the issue of functus officio, I should point out that the application of this rule does not prohibit the court in making consequential orders to the order for sale already made. In *MUI Bank Bhd v Cheam Kim Yu*,[21] Harun Hashim SCJ, whilst pointing out that the court after making an order for sale was functus officio, added (at p 648):

H

> ... after making an order for sale, the judge has the power to make other orders including changes in the reserve price and the auction sales dates, but such orders are consequential to the order for sale.

Similarly in *Malayan United Finance Bhd v Adsonii (M) Sdn Bhd*,[26] Edgar Joseph Jr J (as he then was), in holding that the senior assistant registrar, I had jurisdiction to make an order, consequential to the order for sale made under s 256 of the NLC, that the chargee be permitted to bid at the auction, observed (at p 255): 'The principle of functus officio cannot possibly apply to consequential orders.'

As I have already taken the view earlier that this court is not empowered to make an order for the sale of the charged land by way of private treaty, the issue of whether this court is functus officio after an order for sale has been made, need not be addressed by me in this judgment. However, without deciding on this issue, if the principle of functus officio is applicable to the instant case, that appears to be added reason as to why this court is unable to make an order for the sale of the charged property by way of private treaty.

(b) Subsequent actions by chargor to set aside order for sale

Closely related to the issue of functus officio, is the other issue as to whether a chargor may bring another 'action' seeking to set aside an earlier order for sale made by the court. Though this question has arisen in a number of cases, the exact position of the law remains unsettled.

In *Hock Hua Bank*'s case,[25] as stated earlier, the Federal Court held that if a chargor, after an order for sale had been made, intended to challenge the validity of the order on the grounds of fraud or the availability of new evidence, the chargor ought to commence a fresh action. In such a situation, if the order for sale had been drawn up and perfected, the chargor ought to seek a stay of the foreclosure proceedings until after the hearing of the fresh action.

The Federal Court, however, did not consider the position, whether the chargor may still be in a position to commence a fresh action after a public auction had been conducted pursuant to the order for sale, and the charged property had been bought by a purchaser at the auction. However, the decision of the Supreme Court in *Ker Chee Chuan v Katlyn Enterprise (M) Sdn Bhd*,[27] appears to suggest that the chargor may still challenge the validity of the order for sale made in the foreclosure proceedings, even after the property had been bought by an innocent purchaser at the public auction, and a certificate of sale being issued in favour of the purchaser.

In *Ker Chee Chuan*'s case,[27] the chargor challenged the validity of the order for sale on the grounds that the order for sale was made by the court pursuant to a judgment in default of appearance entered against the company, and that the writ and the subsequent processes for the sale of the land had not been served on it. In other words, *Ker Chee Chuan*'s case[27] was one where an order for sale was made on an ex parte basis.

To this extent, *Ker Chee Chuan*'s case[27] may be distinguished from *Hock Hua Bank*'s case,[25] where the order for sale was made on an inter partes application. I emphasize this distinction as to whether the order for sale was made on an inter partes application or on an ex parte application, as some of the decisions seem to suggest that, if it was made on an ex parte application, the chargor may subsequently apply to set aside the order for sale, in an application to revoke the ex parte order. In such a situation, the question of whether the judge is functus officio does not arise. Such was the situation in *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 1)*,[28] where Edgar Joseph Jr J (as he then was), overruled the preliminary objection that the court was functus officio once the order for sale was perfected, and that the chargor's remedy was only by way of appeal, and not by way of summons-in-chambers (see, however, the views

of Abu Mansor J in *Sindoma Realty Sdn Bhd v Overseas-Chinese Banking Corp Ltd & Ors*[29]).

The position of the innocent purchaser who purchases the charged property at a public auction, and the rights of the chargor after the order for sale had been made was considered in detail in the recent decision of the Supreme Court in *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd*,[4] where the Supreme Court held until the stage where the chargor had divested himself of his proprietary rights (that is, until the payment of the full purchase price), the chargor may intervene to set aside the sale conducted pursuant to a foreclosure proceeding in the event of fraud, impropriety or breach of any statutory or contractual terms of the sale. In that case, the Supreme Court dealt with a situation where the chargor challenged the validity of the sale of the charged property to a purchaser at the public auction on the grounds that the terms of the sale had not been complied with, and as such, the purchaser could not obtain an indefeasible title on registration.

The tentative principles, therefore which may be extracted from the above cases seem to be as follows: (a) a chargor may bring a subsequent action to challenge the order for sale, if the subsequent action is based on fraud, or fresh evidence: *Hock Hua Bank*'s case;[25] (b) where an order for sale has been made ex parte, the chargor may apply to revoke the order for sale so made: *Ker Chee Chuan*'s case,[27] and *UMBC v Syarikat Perumahan Luas (No 1)*;[28] and (c) where no notice had been given to the chargor of any change to the terms or conditions of sale at the public auction, the chargor may apply to set aside the sale to the purchaser: *M & J Frozen Food*.[4]

Though these situations appear to be the circumstances under which a chargor may subsequently challenge the earlier order for sale, the recent decision of the Supreme Court in *Kandiah Peter v Public Bank Bhd*[5] above goes much further by holding that a chargor, may, after order for sale has been granted in a foreclosure proceedings, commence a writ action, based on the same grounds as that in opposition to the making of the order in the foreclosure proceedings, irrespective of any of the aforesaid circumstances. Eusoff Chin SCJ in delivering the judgment of the Supreme Court held as follows (at p 123):

> In our judgment, where a chargor raises issues and relies upon facts to show 'cause to the contrary' in proceedings brought by the chargee under s 256 of the Code, he is not barred from bringing a fresh action against the chargee (notwithstanding that an order for sale has been made) and raising in that action the same or similar facts and issues as those raised by him in the foreclosure proceedings. Neither res judicata nor cause of action estoppel nor issue estoppel are available answers to the chargee to meet the chargor's action.

This decision of the Supreme Court has now been interpreted by some to mean that, even after an order for sale had been made, there is nothing to prevent the chargor from having a second bite at the same cherry by once again commencing an action to oppose the making of the order. A wide interpretation of the Supreme Court decision would mean that the chargor's right to commence a fresh action is not limited to the tentative specified circumstances stated above. The Supreme Court, by holding that the

chargor may institute a subsequent action, 'raising the same or similar facts and issues as those raised in the foreclosure proceedings', appears to be opening the floodgates to allow chargors to challenge the order for sale made by the court, not by way of an appeal to the Supreme Court, but by commencing an action before the same court.

The danger of so opening the floodgate is obvious: there will be no finality in the order for sale made by a court in foreclosure proceedings, and the rights of the purchaser at the auction sale may never be secure, as it is always open to challenge by the chargor at any time, for whatever reasons, including those which had been rejected by the court in the earlier foreclosure proceedings.

The extent to which the decision of the Supreme Court in *Kandiah Peter*[5] affects the current law and practice relating to foreclosure proceedings, remains to be seen. However, I must state that that decision has already been cited before me in support of various propositions, including that of saying that a judge, after making an order for sale is not functus officio; and that a date for the public auction ordered in pursuance of the order for sale made by the court in the foreclosure proceedings, ought not to be made until after it was certain that the chargor was not intending to challenge the order for sale in a subsequent action.

As none of these propositions are directly relevant for the purposes of the present applications, I express no views on the decision. But, I may add, that the decision has far-reaching consequences, and lawyers acting for banks and other financial institutions, may be well advised to bear this decision in mind when advising their clients as to whether an order for sale ought to be sought on default by the chargee. Certainly, the decision appears to go much further than what was decided in the earlier cases. As already stated, the earlier cases seem to indicate that the chargor who is dissatisfied with the decision of the court in making an order for sale, may either appeal against the decision of the court in ordering the order for sale, or he may challenge the sale to a third party pursuant to the order for sale on the ground that the sale was improperly conducted, as was the situation in *M & J Frozen Food Sdn Bhd.*[4]

It is hoped that the Supreme Court in the very near future will have the opportunity to reconsider these issues and cases and restate the principles applicable, so that the present confusion and uncertainties in the law would be overcome.

Conclusion

Practical difficulties may arise as a consequence of the view I have taken of a sale by way of private treaty of a charged property after an order for sale has been granted by the courts. But that appears to be the law, and until the law is changed, I am bound by the law. Courts do not have the power to change the law to suit practical inconveniences which may be caused to certain parties. That is the duty of Parliament.

Applications refused.

Reported by Kevin Ooi